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CASE NO. 85-1492

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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_____/

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Parties to the Proceeding Below

1. BORG-WARNER LEASING: A sub-division of BORG-WARNER ACCEPTANCE CORPORATION

2. BORG-WARNER ACCEPTANCE CORPORATION: the parent company of BORG-WARNER LEASING

3. DOYLE ELECTRIC COMPANY, INC.

4. P.H. DOYLE, JR.

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References to Reports of Opinions Below

Respondent, P.H. Doyle, Jr., accepts the references to reports of opinions below filed by the Petitioner, Borg-Warner Leasing. References to the Appendix filed by the Petitioner are indicated by (App); references to the Record on Appeal are indicated by (R); and references to the Trial Transcript are indicated by (TR).

SUMMARY OF THE ARGUMENT

I. Certiorari should not be granted in this case since the Petition does not present any "special and important reasons" traditionally required for certiorari jurisdiction.

II. The Petition does not reveal any federal question in conflict with a state court of last resort. The Petition does argue the doctrine of "law of the case" which is governed by federal procedural law. However, the decision below is not in conflict with case law considering this doctrine.

III. The Eleventh Circuit properly decided that Florida law concerning reliance on fraudulent misrepresentations

was applicable in the instant case. Neither this decision nor the action of the trial court departed from the usual course of judicial proceedings necessitating this Court's intervention.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

This Court should deny the Writ of Certiorari in this case since there are no special or important reasons for granting it. Rule 17, Rules of the Supreme Court of the United States provides an indication of the character of reasons that will be considered. These include a decision rendered by a federal court of appeals conflicting with the decision of another circuit court, a decision on a federal question in conflict with a state court of last resort or a decision which has departed

from or has permitted a departure by a lower court from the accepted and usual course of judicial proceedings so as to require intervention by this Court. Sup. Ct. R. 17. Also suggested as a reason in Rule 17 is a decision by a federal court of appeals on an important question of federal law either in conflict with decisions of this Court or which has not been, but should be, considered by this Court.

The Petition of Borg-Warner contends that the Eleventh Circuit Court of Appeals erred in its application of the doctrine of the "law of the case" and in failing to apply a decision of the Supreme Court of Arizona on the issue of fraudulent misrepresentation. Borg-Warner does not suggest that the Eleventh Circuit's application of the "law of the case" is

in conflict with that doctrine as applied in any other federal court of appeals. There is also no contention that another Circuit Court has decided the issue of justifiable reliance in a manner in conflict with the Eleventh Circuit's opinion in this case.

Although there are an abundance of cases in which this Court has granted certiorari to review decisions which have created "... a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1928), that is not argued and is not apparent in the case at bar. Since there has been no showing of decisional conflict, the Petition for Writ Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A FEDERAL QUESTION DECIDED IN CONFLICT WITH A STATE COURT OF LAST RESORT OR A DECISION OF THIS COURT, OR AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

No federal question has been raised by Borg-Warner in its Petition. For this reason no argument is made that a federal question has been decided in conflict with a decision of the state court of last resort. A "federal question" is defined as a matter which arises under the Constitution, law or treaties of the United States. 28 U.S.C. Section 1331. As stated earlier, Borg-Warner has contended in its Petition

that errors were made in application of the doctrine of the "law of the case" and in failing to apply Arizona decisional law. (App 26) Borg-Warner Leasing v. Doyle Electric Co., Inc., 733 F.2d 833, 836 (11th Cir. 1984). The issue raised by Borg-Warner as to what constitutes justifiable reliance sufficient to prove fraudulent misrepresentation does not rise to the level of a "federal question". In addition it is not a matter of federal law.

The doctrine of the "law of the case" is a matter of procedure in the federal court system and as such is governed by federal law. The doctrine has been reviewed by this Court on prior occasions and is well settled. When a case is appealed and remanded, the appellate court decision establishes what

is termed the "law of the case", and it must be followed by the trial court on remand. In addition, where the case is remanded and the trial court's judgment is appealed for the second time, the holding from the first appeal establishes the "law of the case" to be followed in the second. 1B Moore's Federal Practice. See also, Lehrman v. Gulf Oil Corporation, 500 F.2d 659, 662-63 (5th Cir. 1974).

Borg-Warner cites Johnson v. Remy 220 F.2d 73 (5th Cir. 1955), in support of its claim that the Eleventh Circuit should have applied Florida law with respect to the "law of the case" doctrine.

The Petitioner suggest that the case stands for the proposition that where decisions are in conflict, the latest Florida supreme court decision

controls. This is not a proper reading of the case. Remy holds that a ruling by the Supreme Court of Florida controls when there is a conflict on a question of purely state law. As was discussed above, the doctrine of the "law of the case" is a matter of procedure in the federal court system and not a question purely of state law. Therefore, federal authority is controlling.

The doctrine has been interpreted by the Eleventh Circuit as requiring that an appellate court's findings of fact and conclusions of law on appeal will be "generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." Westbrook v. Zant, 743 F.2d 764, 768 (11th Cir. 1984) (citing

Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984)). The doctrine encompasses not only those things which have been determined explicitly but also all those which must necessarily have been determined by implication. Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984), citing Dickenson V. Auto Center Mfg. Co., 733 F.2d 1092, 1098 (5th Cir. 1983).

The first time this case appeared before the Eleventh Circuit the issue of reliance was at the very heart of the court's decision. In reversing the summary judgment the Eleventh Circuit had to decide, if only by implication, that the issue of facts with respect to reliance was material and that the defense of fraud in the

inducement was legally sufficient.

In the second opinion the Eleventh Circuit noted that the issue of justifiable reliance had properly been determined to be a jury question which was decided in Doyle's favor on remand. (App 48). Neither the trial court nor the appellate court can substitute its judgment for that of the jury. Griffin v. Swim-Tech Corp.,722 F.2d 677 (11th Cir. 1984). Once the determination was made by the Eleventh Circuit that the issue of reliance was a material fact for the jury's consideration, that court was barred by the "law of the case" from reconsidering the issue of of justifiable reliance and was bound by the jury decision on remand.

III. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A DECISION SO FAR DEPARTING FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTIONING SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR THIS COURT'S SUPERVISION.

The decision of the Eleventh Circuit properly applied applicable law to the facts in the instant case and has not departed from the usual course of judicial proceedings or sanctioned such a departure by the trial court. The Eleventh Circuit correctly applied Florida law in affirming the jury verdict.

The contention by Borg-Warner that somehow Arizona law is applicable to this case is untenable. Borg-Warner searched American case law and was able to find one case that supported its

position. The case principally relied on by Borg-Warner is that of Jones v. Chiado Corp., 137 Ariz. 298, 670 P.2d 403 (1983). Other than the fact that the Jones case supports its position, Borg-Warner has presented no recognized basis for citing the Jones case as controlling. As is obvious from a review of the record, neither the parties nor the subject matter had any nexus with the state of Arizona.

The Eleventh Circuit properly determined during the initial appeal that this action was controlled by Florida law. Borg-Warner Leasing, 733 F.2d at 836. The most recent decision of the Florida supreme court dealing with the issue of reliance on fraudulent misrepresentations is the case of

Bessett v. Basnett, 389 So.2d 995 (Fla. 1980). The court adopted Sections 540 and 541 of the Restatement (2d) of Torts (1976), and in so doing eliminated the "investigation" requirement in fraudulent misrepresentation cases. Bessett v. Basnett, at 997.

The court stated in Bessett that:

> (A) person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two-fraud and negligence-negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.

Id. at 998.

Although this is the most recent decision by the Supreme Court of Florida, other courts within the state have

interpreted the case. Most notably, in Davis v. Department of Health and Rehabilitative Services, 461 So.2d 210 (Fla. 1st DCA 1984) a situation comparable to that presented in the instant case was present. In that case a contractor participated in bidding on a contract to construct a building. Representatives of Health and Rehabilitative Services (HRS) informed the contractor that the building would be used from 8:00 a.m. to 5:00 p.m. Id. at 211. Once the contract had been awarded, HRS informed the contractor that the lease was being interpreted to require the building to be open and operating 24 hours a day, 365 days per year. HRS in turn told the contractor that he would be obligated to provide services during all hours of operation at no additional

cost.

The court relies on Bessett and states that although HRS argued that the contractor could not rely on a fraudulent misrepresentation where the contract was clear and unambiguous on its face, justifiable reliance had been established by Davis. The court noted:

> "Davis was told that the facility would be used from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays. He reasonably and justifiably relied on that information in preparing his bid. He had no duty to further inquire." Id. at 212.

Similarly, Doyle had no obligation to further inquire about the personal guaranty once he was told that it would not be applied to the lease signed by him at that time. This would be true even if he had entered

into a partial investigation by reading some but not all of the personal guaranty agreement.[1] See, Gold v. Perry, 456 So.2d 1197, 1201 (Fla. 4th DCA 1984).

[1] Petitioner has argued that Doyle admitted at trial, for the first time, that he had never read the personal guaranty agreement and that this issue was not presented to the Eleventh Circuit during the first appeal. (Petition at 12-13-). Failure to present the issue on the first appeal lies squarely with the Petitioner since the fact that Doyle had not read the lease documents was known by the Petitioner prior to entry of the summary judgment and was a part of the record at that time. Doyle admitted at his deposition taken on December 15, 1982, that he doubted that he had read through all the documents before signing them. (Deposition of Doyle, December 15, 1982, at 13). Doyle's deposition was filed and used in support of Petitioner's Motion for Summary Judgment.

CONCLUSION

This Court has previously noted that

> "it is very important that we be consistent in not granting the writ of certiorari except in case involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The principles of fraudulent misrepresentation are well settled under Florida law. There is no indication of any conflict between the circuit court of appeal on any of the issues considered and decided by the Eleventh Circuit, below. Since Borg-Warner has failed to raise any issue falling within

the character of reasons usually considered for the granting of a writ of certiorari, it is respectfully requested that the Petition be denied.

AFFIDAVIT OF SERVICE

RICHARD J. SALEM, being duly sworn, deposes and says:

On the 11th day of April, 1986, I deposited three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in a United States Post Office in Tampa, Florida with first class postage pre-paid to David A. Townsend, Esq., Counsel of Record, 100 E. Madison St., Suite 301, Tampa, Florida 33601.

/S/
Richard J. Salem

SWORN TO and subscribed before me this 11th day of April, 1986.

/S/
Notary Public

My Commission expires: